IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
(Martinsburg Division)

BANK OF CHARLES TOWN,

Plaintiff,

v. **CIVIL ACTION NO. 3:10-cv-102JPB**
(Removed from the Circuit Court of Jefferson County, No. 10-C-312)

ENCOMPASS INSURANCE,
ENCOMPASS INDEMNITY COMPANY,
MICHELLE GROSSMAN,
JOHN WILSON, AND JOHN OR JANE DOE,

Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISSAL Of MICHELE GROSSMAN

COMES NOW Defendant Michele Grossman **(**incorrectly identified as Michelle Grossman)**,** by and through her counsel, E. Kay Fuller and Martin & Seibert, L.C., and in reply to Plaintiff's Response as well as in further support of her Motion to Dismiss does state as follows:

Plaintiff now admits Michele Grossman is not a proper party defendant to Counts of the Complaint alleging breach of contract, declaratory judgment or estoppel, Counts I, III and IV, respectively. As such, an Order dismissing said claims against Ms. Grossman is appropriate at this time and a proposed Order is attached hereto for the Court's consideration.

As to the only potentially viable claim against Ms. Grossman, Count II, said Count must likewise be dismissed for failure to properly serve process. Service of process rules as set forth in the West Virginia Rules of Civil Procedure govern this issue and clearly provide the potential manner of service upon an individual. Rule 4(d) of the West Virginia Rules of Civil Procedure states:

> **(d) Manner of Service**. Personal or substituted service shall be made in the following manner:
>
> (1) *Individuals.* Service upon an individual other than an infant, incompetent person, or convict may be made by:
>
> (A) Delivering a copy of the summons and complaint to the individual personally; or
>
> (B) Delivering a copy of the summons and complaint at the individual's dwelling place or usual place of abode to a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint; or
>
> (C) Delivering a copy of the summons and complaint to an agent or attorney-in-fact authorized by appointment or statute to receive or accept service of the summons and complaint in the individual's behalf; or
>
> (D) The clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, and delivery restricted to the addressee; ...

W. Va. R. Civ. P. 4.

Strict compliance with Rule 4 is required. *McClay v. Mid-Atlantic Country Magazine*, 435 S.E.2d 180, 185 (W. Va. 1993). The Bank now admits in its Response that it did not follow any of the aforementioned five alternative methods to serve Ms. Grossman. This admission must again be applied against the Bank and Ms. Grossman dismissed with prejudice from the present civil action.

To the extent the Bank pleads for more time pursuant to the 120-day period to serve, the Bank affirmatively took action within the service period to serve Ms.

Grossman. It pursued an improper method of service and should not therefore be granted additional time to again serve Ms. Grossman. Lacking proper service, the Complaint against Michele Grossman must be dismissed pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure. A second proposed Order with respect to Count II of the Complaint is likewise attached for the Court's consideration.

CONCLUSION

Plaintiff Bank has admitted it did not intend to include Ms. Grossman in Counts I, III and IV of its Complaint. Thus, by agreement, Ms. Grossman can now be dismissed with prejudice as to those Counts of the Complaint.

As to the remaining Count of the Complaint, Count II, service was admittedly improper and again requires dismissal.

For the foregoing reasons, Defendant Michele Grossman respectfully requests this Court dismiss her with prejudice from the present civil action.

MICHELE GROSSMAN
By Counsel

MARTIN & SEIBERT, L.C.

/s/ E. Kay Fuller________
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CERTIFICATE OF SERVICE

I, E. Kay Fuller, counsel for Michele Grossman, hereby certify that on the **8th** day of **November**, **2010**, served the ***Reply Memorandum of Law in Support of Motion to Dismiss of Michele Grossman,*** upon the counsel identified below and filed the instant Certificate with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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__/s/E. Kay Fuller______________